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No. 85-535

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

QUINAULT INDIAN NATION, QUILEUTE INDIAN TRIBE, and HOH INDIAN TRIBE,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Are treaty Indians entitled to take in excess of the maximum 50% tribal opportunity share established by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979), merely because the state has dedicated its

share to a less efficient sport fishery which may not result in a full non-tribal harvest?

2. Was the District Court's order in this case a "final decision" within the meaning of 28 U.S.C. § 1291 in view of the fact that it resolved the foregoing question in a manner which conflicts with this Court's decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra?*

COUNTERSTATEMENT OF THE CASE

The respondents are unable to accept petitioners' statement of the case. The extent of distortion in that statement of the case seems to us to be extreme. Moreover, a great deal of extraneous information has been included therein. A neutral and more efficient statement of the case is set forth in the Ninth Circuit panel's opinion:

> The issues presented on this appeal are tied to the question of salmon escapement on the Queets, Hoh, and Quillayute Rivers in northwestern Washington. In 1982 and 1983, the district court's Fishery Advisory Board (FAB) considered a dispute over the appropriate number of Fall Chinook that should be allowed to escape the in-river fisheries and spawn. The Tribes argued that fewer spawners were necessary to produce a Maximum Sustained Yield (MSY) than the number of spawners insisted upon by the state.
>
> In 1982, the FAB developed an interim, data-gathering or "probing plan" to aid in determining the escapement levels necessary to sustain optimum yield. FAB 82-21. Under the plan, a fixed catch-rate of 40% of the run was adopted. As fish density varies from year to year, the fixed exploitation rate was designed to produce a varying range of actual numbers of spawners. These data would then be used by resource managers to determine the escapement levels necessary to achieve MSY.
>
> This fixed-rate exploitation plan was developed without State cooperation, and the State did not challenge the approach in district court. The

allocation between Indian and non-Indian fisheries within the 40% exploitation rate was not, however, a factor in the 1982 plan

In 1983, the court's technical advisor issued a series of separate recommendations for the Fall Chinook season on the Queets, Hoh and Quillayute Rivers. FAB Nos. 83-31, 83-33, 83-35. The recommendations concluded that to effectively probe optimum yield, fish determined to be unharvestable by one party must be available for harvest by the other party in order to assure a fixed catch. The advisor noted that the State's claimed right to assign part of its allocation to non-harvest recreational uses would result in exploitation of less than 40% of the run, thereby undermining the FAB's probing plan.

This results from the nature and location of the fisheries. The State hook and line sports fishery is located upstream from the tribal commercial net fishery. Thus, harvestable fish not caught by the sports fishery necessarily result in greater escapement, undermining the fixed catch goal.

Subsequently, the State filed a request for review of the recommendation in the district court. The State's primary objection was that the interim plan would authorize a tribal catch exceeding its 50% allocation. The State argued that the plan would infringe its opportunity to catch 50% of the harvestable run since a greater tribal catch necessarily reduces the number of fish available to the sports fishery.

ARGUMENT

1. The decision of the court of appeals is consistent with and protective of the rule of *Passenger Fishing Vessel.*

The so-called Stevens Treaties reserved to the signatory tribes a "right of taking fish." The pertinent language provides:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory * * *"

In *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), this court interpreted the "in common with" language of the foregoing treaty provision to authorize a maximum (but not a minimum) allocation of 50% of the harvestable fish to treaty Indian fishers, saying:

> "Only then did [the District Court] determine that the Indians present day subsistence and commercial needs should be met, subject, of course, to the 50% ceiling. * * *
>
> "It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. * * * Accordingly, while the maximum possible allocation is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances."

443 U.S. at 686. The merits of the issue sought to be raised by the petition here were thus dealt with directly and fully by this Court.

The Ninth Circuit's reversal of the District Court did nothing more than preserve the integrity of this Court's decision in *Passenger Fishing Vessel, supra*. The Court Advisor's invalidated plan to allow tribal harvest of the Non-Indian share ran clearly afoul of this Court's earlier decision. It also embodied a "self-fulfilling prophecy" element which could well have locked non-treaty sport fishers into a hopeless cycle of endlessly reduced fishing opportunity. This cycle or trend would have followed from the very fact that future non-treaty sport fishing allocations were predicated on actual non-tribal harvest under a system which drastically reduced non-tribal opportunity at the very outset. The supposition that non-tribal sport fishing effort would somehow increase in a context where sport fishing *opportunity* was artificially reduced by a federal court order simply made no sense to those charged by state law with providing that opportunity and, apparently the Ninth Circuit panel agreed.

2. Because the District Court's post-judgment order resolved the central issue of law in a manner violative of this court's holding that Stevens Treaty Tribes enjoy a maximum allocation of 50% of the harvestable fish, it was a final decision appealable under 28 U.S.C. § 1291.

In the Circuit Court, the Appellee Tribes (Petitioners here) asserted that the court below lacked jurisdiction since the District Court had failed to certify its order (approving the challenged plan) as appealable under FRCP 54(b) or 28 U.S.C. § 1292(b).[1] The thrust of their claim there (and here) seems to be that the District Court's order appealed from is equivalent to a partial decision rendered *prior* to judgment on the merits.

The Ninth Circuit panel dismissed the jurisdictional argument, holding that this particular post-judgment order was, quite simply, a "final decision" which was appeallable under 28 U.S.C. § 1291.[2] In so holding, the Ninth Circuit panel said:

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[1] 28 U.S.C. § 1292(b) reads as follows:
When a district court judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

[2] 28 U.S.C. § 1291 reads as follows:
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

> "It is sometimes appropriate to give the finality requirement a practical rather than a technical construction. * * * '[F]inal * * * does not necessarily mean the last order possible to be made in a case.' *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).
>
> "This is particularly true when post-judgment orders are involved. The policy against and the probability of piecemeal review is not as decisive a consideration after judgment as before judgment since the underlying dispute is already settled. * * * Moreover, unless such orders are found final, there is often little prospect that further proceedings will occur to make them final." [Citation Omitted]

Petition, Appendix A at 5. The soundness of the Ninth Circuit's rationale seems unassailable in the context of this particular appeal. As became apparent when the panel reached the merits, the post-judgment order in this case did utter violence to this Court's well-considered opinion in *Passenger Fishing Vessel*. Had the order *not* been treated as a final decision under 28 U.S.C. § 1291, the non-tribal treaty beneficiaries might have remained saddled with an unreviewable decision denying them their treaty-protected opportunity to share equally in the harvest of available fish.

CONCLUSION

For the reasons foregoing, the Respondents respectfully request that this Court enter an appropriate order denying the Petition for Certiorari.

Respectfully submitted,

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